

NOTICE

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IN THE COURT OF APPEALS OF THE STATE OF ALASKA

SAMUEL DEAN CODY JORDAN,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11518
Trial Court No. 3AN-12-10205 CR

MEMORANDUM OPINION

No. 6501 — August 2, 2017

Appeal from the District Court, Third Judicial District,
Anchorage, Leonard M. Linton Jr., Judge.

Appearances: Catherine Boruff, Assistant Public Defender, and
Quinlan Steiner, Public Defender, Anchorage, for the Appellant.
G. Michael Ebell, Assistant District Attorney, Anchorage, and
Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock,
Superior Court Judge.*

Judge ALLARD.

Following a jury trial, Samuel Dean Cody Jordan was convicted of fourth-degree assault based on allegations that he slapped his ex-girlfriend, Jessica Phillips. On appeal, Jordan argues that the trial court erred when it allowed the prosecution to

* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

introduce 911 calls that related to prior incidents of domestic violence between Jordan and Phillips. At trial, Jordan's attorney objected to this evidence, arguing that it was more prejudicial than probative. He also objected on the grounds that the evidence was not provided to the defense until the first day of trial and he therefore had not had any opportunity to review its contents. The trial judge overruled these objections without any offer of proof from the prosecutor regarding the contents of the late-discovered evidence and without conducting the necessary balancing test under Alaska Evidence Rule 403 and *Bingaman v. State*.¹ The trial judge subsequently refused to grant Jordan's attorney a continuance so that Jordan's attorney could fairly respond to this late-produced evidence, and also refused to provide a curative instruction that would have corrected some of the factually inaccurate information contained in these calls.

For the reasons explained here, we conclude that the trial judge's multiple errors in the admission of this late-produced evidence undermined the fundamental fairness of Jordan's trial. We accordingly reverse Jordan's conviction.

Background facts and prior procedural history

On September 30, 2012, at 1:30 a.m., Jessica Phillips called 911 and reported that her ex-boyfriend, Samuel Jordan, had assaulted her and had then left her house on foot. Officers were dispatched to the house. But, before they arrived, Phillips's mother called 911 and said that her daughter was now saying that she had not been assaulted and that the police were no longer needed. The dispatcher spoke with Phillips again and she stated that Jordan had, in fact, hit her.

Anchorage Police Officer Theodore Freitag was one of the officers who responded to the call. He then interviewed Phillips, who was intoxicated. Phillips

¹ *Bingaman v. State*, 76 P.3d 398 (Alaska App. 2003).

reported that she and Jordan had gone to Chilkoot Charlie's that evening and had argued as they returned to her house. She stated that Jordan slapped her in the face outside the house, causing her to fall down against a fence. Officer Freitag observed redness on Phillips's face that he concluded was consistent with her account. Phillips's mother told Officer Freitag that she had been inside the house and had not seen what happened between Phillips and Jordan.

In the meantime, Officer Keo Fujimoto located Jordan walking about a mile from the house. Jordan denied assaulting Phillips, and said that he had walked away from her house because "he didn't want any drama."

Jordan was arrested and charged with assault in the fourth degree.² Prior to trial, the State filed a notice of intent, under Evidence Rule 404(b)(4), to introduce evidence of two prior domestic violence incidents from the past year in which Jordan assaulted Phillips.³ Both incidents resulted in misdemeanor convictions. The trial judge ruled that the prior judgments were admissible as evidence of the prior incidents, although the attached complaints were not.⁴

On the first day of trial, Phillips informed the court that she would be invoking her right against self-incrimination if she was called to testify. The trial judge determined that Phillips had a valid Fifth Amendment privilege, and the State then granted her immunity.

² AS 11.41.230(a)(1).

³ See Alaska Evid. R. 404(b)(4) ("In a prosecution for a crime involving domestic violence or of interfering with a report of a crime involving domestic violence, evidence of other crimes involving domestic violence by the defendant against the same or another person or of interfering with a report of a crime involving domestic violence is admissible.").

⁴ See *Jones v. State*, 215 P.3d 1091, 1101 (Alaska App. 2009).

Because of Phillips's reluctance to testify and the fact that she clearly intended to recant the current accusation against Jordan, the prosecutor was concerned that Phillips might also deny that the prior incidents of domestic violence had occurred. In anticipation of this, the prosecutor obtained the 911 audio recordings of the prior incidents and gave them to the defense attorney on the first day of trial. The prosecutor then asserted that she intended to introduce these 911 audio recordings into evidence if Phillips took the stand and denied that Jordan had assaulted her on these prior occasions.

Jordan's attorney objected to admission of the 911 audio recordings related to the prior incidents. He pointed out that these recordings had not been provided to the defense until the morning of trial, and that he had not had a chance to listen to them and did not know exactly what they contained. He asserted that if the judge was considering allowing the prosecutor to introduce this late-produced evidence, the defense should be granted a continuance so that it could first determine what the recordings contained. The defense attorney also pointed out that the trial judge would need to hold a *Bingaman* hearing to determine whether the alleged probative value of the recordings outweighed their potential for unfair prejudice.

Lastly, the defense attorney argued that it would be premature to rule on the admissibility of the recordings until after Phillips took the stand and either admitted or denied the prior incidents. He also argued that even if Phillips denied the prior incidents, there would likely be less prejudicial means to establish what had occurred during the prior incidents.

The trial judge initially agreed with the defense attorney that there was no need to rule on the admissibility of the prior 911 recordings until after Phillips took the stand and either admitted or denied the prior domestic violence incidents. The judge also indicated that he too was concerned about the late production of this evidence to the defense, and was likewise concerned about the possibility that the evidence would be

more unfairly prejudicial than probative. The judge indicated that he intended to decide what particular evidence would come in about the prior incidents (beyond the judgments) “sentence by sentence, question by question, answer by answer.”

In response to the judge’s initial ruling, the prosecutor agreed that there would be no need to introduce the 911 recordings of the prior incidents if Phillips did not deny the prior incidents.

Despite this apparent agreement, however, the prosecutor subsequently sought to introduce the 911 calls from the prior incidents through her first witness, who was the 911 dispatcher from the current incident. When the prosecutor moved to introduce the audio recording from the current incident, she noted that the same disk also included the 911 calls from the prior incidents, and she then asked to introduce those recordings as well.

The defense attorney immediately renewed all of his prior objections to the introduction of the late-produced 911 calls related to the prior incidents, pointing out that the judge had already ruled that it was premature to introduce this evidence until after Phillips had testified.

Without much explanation, the trial judge reversed his prior ruling and overruled the defense attorney’s objections, allowing the prosecutor to introduce the late-produced recordings despite the fact that neither the defense attorney nor the court actually knew what they contained. The prosecutor was not asked to provide an offer of proof of what the calls contained or to explain why their probative value outweighed their risk for undue prejudice. The only explanation the judge gave for the abrupt reversal of his prior decision was that playing all the 911 calls together appeared to be a “reasonable” way to present this evidence and “the most efficient” way to prove what happened in the prior incidents.

Following the judge's ruling, the prosecutor proceeded to play for the jury the 911 calls from the current incident and the two calls from the prior incidents. As Jordan's attorney had predicted, the calls from the prior incidents contained very little substantive information about the prior incidents.

The 911 call from the first prior incident lasted five minutes and twenty-seven seconds. Throughout most of the call, Phillips was screaming and crying hysterically, and her words were indiscernible. The 911 operator was unable to understand Phillips, and she spent much of the call getting Phillips to clearly state her own name and Jordan's name. In the background a baby was crying and, at one point, a man could be heard saying "fuck you." The dispatcher managed to get a few basic facts from Phillips, such as the make and model of Jordan's car, but no details of the assault were discernible.

The 911 call from the second incident lasted three minutes and ten seconds. The call was made by Julio Jagacia, an upstairs neighbor. In the 911 call, Jagacia told the dispatcher that two women from the downstairs apartment had come up to report that they had been assaulted. Jagacia, who was calm, stated that he had never before met the woman who reported the assaults. Jagacia told the 911 dispatcher that one of the women told him that a man was abusing both women and had strangled one of them. Both women can be heard in the background screaming and crying. Neither woman spoke to the dispatcher, and the State did not call Jagacia as a witness at trial.

(As is clear from the record, Jagacia's second-hand report of the incident was factually inaccurate. Jagacia reported that one man had assaulted the two women, but there was another man present in Phillips's apartment at the time, and that man was subsequently charged and convicted of assaulting Phillips's sister during the same incident for which Jordan was convicted of assaulting Phillips.)

Phillips was called as the State's fourth witness at Jordan's trial. As expected, Phillips recanted the current allegation, claiming that Jordan did not slap her. Phillips testified that she lied to the 911 dispatcher and the responding officer about the slap because she was angry at Jordan and wanted him arrested. However, Phillips admitted that the prior incidents of domestic violence had occurred.

Following Phillips's testimony, Jordan's attorney moved for a mistrial, arguing that admission of the 911 recordings from the prior incidents had undermined the fundamental fairness of his trial. The defense attorney argued that it was now clear that the recordings were inflammatory, unfairly prejudicial, and of little probative value — particularly in light of the fact that Phillips had not denied the prior incidents of domestic violence. The defense attorney also pointed out that some of the information in the calls was clearly hearsay and factually inaccurate. The defense attorney argued that the defense had been prejudiced by the prosecutor's failure to provide the recordings until the morning of trial. And he further asserted that the evidence should not have been admitted without a proper *Bingaman* hearing.

The trial judge denied Jordan's motion for a mistrial, stating in a conclusory manner that the evidence was properly admitted under *Bingaman*.

The defense attorney then asked for a continuance, explaining that he needed to investigate the prior incident involving the neighbor to determine whether to call witnesses to rebut the neighbor's misleading report to the 911 operator. The trial judge denied the request for a continuance, suggesting instead that the defense attorney call Phillips back to the stand and ask her about the prior incident in more detail. The defense attorney argued that the State's position was that Phillips was a liar, so simply calling her back to the stand would be fruitless, whereas independent witnesses from the prior episodes would potentially be more credible to the jury. Once it became clear that the judge would not grant the requested continuance, the defense attorney then asked that

the jury be instructed that the neighbor's hearsay account of the second incident was not accurate. The judge denied this request.

The jury subsequently returned a guilty verdict, convicting Jordan of fourth-degree assault. This appeal followed.

The trial judge's actions undermined the fundamental fairness of Jordan's trial and require reversal of Jordan's conviction

Alaska Evidence Rule 404(b)(4) provides that evidence of other acts of domestic violence are exempt from the normal prohibition against propensity evidence. But the admissibility of evidence under Evidence Rule 404(b)(4) still remains subject to other evidentiary rules, including Evidence Rules 402 and 403.⁵ Alaska Evidence Rule 402 bars the admission of irrelevant evidence, while Alaska Evidence Rule 403 excludes evidence "if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

In *Bingaman v. State*,⁶ this Court held that a trial judge's failure to analyze Rule 404(b)(4) evidence under Evidence Rules 402 and 403 may require reversal of the defendant's convictions.⁷ In *Bingaman*, we also laid out factors for the trial judge to consider when deciding whether evidence of a defendant's other acts should be admitted under Evidence Rule 404(b)(4):

1. How strong is the government's evidence that the defendant actually committed the other acts?

⁵ *Bingaman*, 76 P.3d at 411-14.

⁶ 76 P.3d 398 (Alaska App. 2003).

⁷ *Id.* at 416.

2. What character trait do the other acts tend to prove?
3. Is the character trait relevant to any material issue in the case? How relevant? And how strongly do the defendant's other acts tend to prove this trait?
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4. Assuming that the offered character evidence is relevant to a material issue, how seriously disputed is this material issue? Does the government need to offer more evidence on this issue? And is there less prejudicial evidence that could be offered on this point? In other words, how great is the government's need to offer evidence of the defendant's other acts? Or, if evidence of one or more other acts has already been admitted, how great is the government's need to offer *additional* evidence of the defendant's other acts?
5. How likely is it that litigation of the defendant's other acts will require an inordinate amount of time?
6. And finally, how likely is it that evidence of the defendant's other acts will lead the jury to decide the case on improper grounds, or will distract the jury from the main issues in the case?⁸

Here, while the trial judge ostensibly found the 911 calls admissible under *Bingaman*, he did not actually make any attempt to apply the *Bingaman* factors; nor did he engage in any sort of review of the evidence prior to its admission. Indeed, the evidence was admitted without giving the defense attorney time to review it and without even an offer of proof from the prosecutor regarding what it contained. As a result, both the defense attorney and the judge only became aware of the contents of the 911 recordings when they were played for the first time for the jury. The judge's failure to

⁸ *Id.* at 415-416.

engage in any review of the evidence, despite the defense attorney's repeated objections, represents a clear abdication of the trial judge's gate-keeping function under *Bingaman*.⁹

The judge's error was then further compounded by his refusal to grant the defense a continuance or to take any other ameliorative steps to address the factual inaccuracies in the prior 911 calls.¹⁰

We note that many of the problems in this case arose from the prosecutor's failure to provide timely discovery of the prior 911 calls. Although the trial judge initially indicated that he was "concerned" about this late production, he ultimately ignored this problem in his subsequent rulings, and he seemingly failed to appreciate how the late production prejudiced the defense and impacted the judge's own ability to fulfill his gate-keeping function under *Bingaman*.¹¹

As it turned out, the recordings contained very little substantive information about the prior incidents. They did, however, contain inflammatory and partially inaccurate information about the prior incidents that may have unfairly prejudiced the jury against Jordan. We note that the State does not argue that admission of these recordings, if error, was nevertheless harmless. We also note that the ostensible justification forwarded by the prosecutor for introducing this evidence never actually materialized.

Based on the record in this case, we conclude that the judge erred when he admitted this evidence and that the judge's multiple errors in his handling of this late-produced evidence undermined the fundamental fairness of Jordan's trial. Accordingly, we reverse Jordan's conviction.

⁹ See *id.* at 417.

¹⁰ See *Bostic v. State*, 805 P.2d 344, 347 (Alaska 1991).

¹¹ See *Bingaman*, 76 P.3d at 417.

Conclusion

The judgment of the district court is REVERSED.